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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CALLAHAN, THOMPSON, SHERMAN & CAUDILL, LLP,

Plaintiff and Respondent,

v.

PATHWAYDATA, INC., et al.,

Defendants and Appellants.

G051511

(Super. Ct. No. 30-2013-00628192)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Franz E. Miller, Judge. Judgment affirmed in part and reversed in part with directions.

Law Office of Ronald H. Freshman and Ronald H. Freshman for Defendants and Appellants.

Callahan, Thompson, Sherman & Caudill, Lee A. Sherman and Erin M. Mallon for Plaintiff and Respondent.

* * *

PathWayData, Inc., doing business as ConsumerDirect (PathWayData), and David Bryan Coulter (collectively defendants) appeal from a judgment confirming an arbitration award in favor of Callahan, Thompson, Sherman & Caudill, LLP (Callahan). The judgment was entered after the trial court granted Callahan's petition to confirm that award, and denied defendants' petition to vacate it. On appeal, defendants claim the court erred in several respects. Initially, they argue the trial court erred in granting Callahan's initial petition to compel arbitration, contending the arbitration clause in the parties' agreement is unconscionable. In addition, defendants attack the trial court's order confirming the arbitration award. They argue the arbitrator engaged in misconduct by refusing to continue the arbitration hearing and barring defendants from presenting evidence. Defendants also claim the arbitrator made erroneous rulings, which included awarding Callahan attorney fees and costs and by finding Coulter personally liable on the ground he was the alter ego of PathWayData.

We conclude the arbitrator exceeded his powers by imposing liability on Coulter, but otherwise reject defendants' claims. Further, because the requirements of Code of Civil Procedure sections 1286.6 and 1286.8[1] have been satisfied, we reverse the judgment with directions to correct the arbitration award by deleting Coulter's liability and confirming it as against PathWayData. If Callahan wishes to add Coulter as a judgment debtor to the corrected judgment, it must proceed in compliance with section 187.

I

FACTS

The parties entered into a "Legal Services Agreement" (LSA). (Original bolding and capitalization omitted.) Under it, Callahan agreed to provide legal advice and representation to PathWayData and, in return, PathWayData agreed "to pay . . . for

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[1] All further statutory references are to this code.

all time spent on Client's matter by Attorneys' legal personnel." Coulter signed the LSA as PathWayData's chief executive officer.

The LSA contained an arbitration clause. Paragraph 19 stated: "In any controversy or claim arising out of or relating to this Agreement, or the breach thereof, the dispute will be submitted for binding arbitration to a retired California Superior Court Judge and Attorney and Client will be bound by the result. Client understands and acknowledges that, by agreeing to binding arbitration, he/she waives the right to submit the dispute for determination by a court and thereby also waives the right to a jury or court trial." In addition, the following statement appears just above Coulter's signature: "**ARBITRATION NOTICE TO CLIENT: BY SIGNING THIS AGREEMENT, CLIENT AGREES TO HAVE ISSUES INCLUDING MALPRACTICE DECIDED BY BINDING ARBITRATION AND CLIENT IS GIVING UP CLIENT'S RIGHT TO A COURT OR JURY TRIAL FOR SUCH DISPUTES.**" The LSA authorized an award of attorney fees and costs to "[t]he prevailing party in any action or proceeding to enforce any provision of this agreement."

Callahan filed a petition to compel PathWayData to arbitrate a claim for unpaid fees. PathWayData did not file a written response and no one appeared for the corporation at the hearing. The trial court granted the petition.

Ten months later, Callahan filed a motion requesting the trial court appoint an arbitrator. Callahan presented evidence the parties' attempt to select an acceptable arbitrator failed because PathWayData objected to each possible candidate, and ultimately "refus[ed] to participate in the selection process." PathWayData did not oppose the motion. The trial court appointed Retired Judge Francisco F. Firmat of ADR Services, Inc. (ADR) as arbitrator.

On May 12, 2014, ADR sent the parties notice that an arbitration before Judge Firmat was scheduled for August 19. The notice directed the parties to submit

arbitration briefs by August 15, and also contained an invoice billing each party $3,139.58 for the arbitration.

Callahan timely filed an arbitration brief. In it, for the first time, Callahan asserted Coulter was personally liable for the unpaid fees on the theory PathWayData was his alter ego. PathWayData did not file a brief. Rather, its attorney e-mailed a letter to ADR, declaring "my client does not plan to appear" at the arbitration. Counsel's e-mail claimed PathWayData could not afford to pay its portion of the arbitration fees, there had been "[n]o resolution of [the fee] payment" issue, and referred to ADR e-mails that, according to him, stated the arbitration would not proceed without payment of the fees. PathWayData's attorney also asserted, "[n]o adequate time has been allowed for briefing said mediation."

The arbitration proceeded as scheduled on August 19. Based on PathWayData's failure to pay the arbitration fee, Callahan filed a motion in limine to bar it from presenting evidence at the hearing. PathWayData's attorney appeared at the hearing, telling the arbitrator PathWayData would not be present, he would not cross-examine witnesses or present a defense, and he was there "only to witness the proceedings." Based on these representations, the arbitrator ruled Callahan's motion in limine was moot.

An attorney with the Callahan firm who had represented PathWayData as corporate and litigation counsel testified concerning the execution of the LSA, the nature of the legal services provided to PathWayData, and Callahan's billings for its services. The evidence reflected PathWayData had incurred over $85,700 in fees and costs that remained unpaid. The arbitrator found the evidence supported an award against PathWayData for the unpaid fees, prejudgment interest, attorney fees, and costs.

As noted, Callahan also claimed that Coulter should be found personally liable for the unpaid fees under the alter ego doctrine. The arbitrator allowed PathWayData's attorney to object to this request. With approval of all parties, the

arbitrator scheduled the filing of briefs and a second hearing to consider whether Coulter could be held personally liable for the award.

Both parties submitted briefs. The defendants' brief was filed on behalf of both Coulter and PathWayData. Callahan again moved in limine to preclude defendants' participation in the hearing for nonpayment of arbitration fees.

At the second hearing, the arbitrator granted Callahan's in limine motion. The Callahan firm member who represented PathWayData testified the corporation never held meetings, she never saw corporate minutes, and in her representation of the corporation, never dealt with anyone other than Coulter. Also, during the course of one lawsuit, Coulter told her that if PathWayData lost the case, he intended to close the corporation and open a new business. The arbitrator ruled in Callahan's favor and issued a final award of $156,292.18 against both PathWayData and Coulter.

Callahan petitioned to confirm the award while defendants sought to vacate it. The trial court granted Callahan's petition and denied defendants' request. It found defendants waived their claim the arbitration agreement was unconscionable by not asserting it in response to Callahan's petition to compel arbitration and also made no showing to support this defense. The court also concluded defendants failed to support claims they could not pay the arbitration fees or were prejudiced by the timing of the arbitration hearing. Finally, the court held the arbitrator did not commit any factual or legal errors that would support vacating the award or the fees and costs included in it.

II

DISCUSSION

A. Standard of Review

The following principles govern our review of the trial court's ruling and the arbitrator's award.

"We subject the trial court's rulings and the underlying award to different standards of review. To the extent the trial court made findings of fact in confirming the award, we affirm the findings if they are supported by substantial evidence. [Citation.] To the extent the trial court resolved questions of law on undisputed facts, we review the trial court's rulings de novo. [Citation.]" (*Cooper v. Lavely & Singer Professional Corp.* (2014) 230 Cal.App.4th 1, 11-12; *Turner v. Cox* (1961) 196 Cal.App.2d 596, 603.)

However, "[w]e apply a highly deferential standard of review to the award itself, insofar as our inquiry encompasses the arbitrator's resolution of questions of law or fact. Because the finality of arbitration awards is rooted in the parties' agreement to bypass the judicial system, ordinarily '"[t]he merits of the controversy between the parties are not subject to judicial review." [Citations.]' [Citation.] [¶] Under this rule, courts will not review the arbitrator's reasoning or the sufficiency of the evidence supporting the award. [Citation.] Moreover, absent 'narrow exceptions' . . ., 'an arbitrator's decision cannot be reviewed for errors of fact or law.' [Citation.]" (*Cooper v. Lavely & Singer Professional Corp.*, *supra*, 230 Cal.App.4th at p. 12.)

B. Enforceability of the Arbitration Award

The defendants first contend the trial court erred in failing to hold the LSA's arbitration clause is unconscionable. We agree with the court's findings that defendants waived this issue. Further, we conclude defendants have failed to support their claim the LSA's arbitration clause is unconscionable.

Section 1281.2 declares that when a party petitions to compel arbitration, "the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate . . . exists . . . ." One exception to this rule is where "[g]rounds exist for the revocation of the agreement." (§ 1281.2, subd. (b).) A finding the agreement to arbitrate is "unconscionable or contrary to public policy" constitutes a basis to deny a petition to compel arbitration. (*Bickel v. Sunrise Assisted*

Living (2012) 206 Cal.App.4th 1, 8.) But defendants bore "the burden of proving" the unconscionability defense (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972), and they waived it by failing to submit any response to Callahan's petition to compel arbitration.

However, "[t]he issue whether a contract provision is unconscionable is a question of law." (*Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1316.) And since an order granting a petition to compel arbitration is nonappealable (*Villacreses v. Molinari* (2005) 132 Cal.App.4th 1223, 1229), "a party compelled to arbitrate is entitled to have the validity of the order reviewed on his appeal from a judgment confirming an award" (*Wheeler v. St. Joseph Hospital* (1976) 63 Cal.App.3d 345, 353). Here, defendants raised the defense of unconscionability in their petition to vacate the arbitration award.

But even on the merits, their argument is unavailing. To bar enforcement of a contractual provision on this basis a party must prove it is both procedurally and substantively unconscionable. (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 910, 912.) The record in this case supports a finding of some procedural unconscionability. The LSA is a preprinted contract drafted by Callahan and it was presented to PathWayData on a take-it-or-leave-it basis. (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1133.) "Yet 'a finding of procedural unconscionability does not mean that a contract will not be enforced, but rather that courts will scrutinize the substantive terms of the contract to ensure they are not manifestly unfair or one-sided.'" (*Sanchez v. Valencia Holding Co., LLC*, *supra*, 61 Cal.4th at p. 915.)

Defendants assert several reasons to support their claim the arbitration clause is substantively unconscionable. One ground is that the provision lacks mutuality. They are wrong. In simple, easy to read language, it subjects *both* parties to binding arbitration before a retired superior court judge "[i]n any controversy or claim arising out

of or relating to this Agreement, or the breach thereof . . . ." Defendants fail to cite to any aspect of the arbitration clause that renders it one-sided.

Next, defendants rely on Coulter's declaration supporting the petition to vacate the arbitration award. In it, Coulter claimed he was told the LSA was Callahan's "standard agreement," the arbitration clause was "neither pointed out to me, nor discussed with me," and he signed it "without reviewing, reading or the LSA being explained otherwise to me."

First, under the objective theory of contract Coulter's assertion he did not read the LSA is unavailing. "[T]he general rule [is] that one who assents to a contract is bound by its provisions and cannot complain of unfamiliarity with the language of the instrument." (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 710; *Mission Viejo emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, 1154-1155.) Second, this argument involves a question of fact that we review for substantial evidence. (*Fagelbaum & Heller LLP v. Smylie* (2009) 174 Cal.App.4th 1351, 1360.) The evidence in this case supports a rejection of defendants' unconscionability claim. They did not assert the purported lack of knowledge or agreement to arbitrate when Callahan petitioned to compel arbitration, and PathWayData initially participated in the unsuccessful effort to mutually select an arbitrator. Defendants again failed to raise this argument when the arbitration was scheduled and conducted. Thus, we conclude the belated claim defendants did not know about the arbitration clause or agree to it lacks credibility.

Defendants also argue the arbitration clause is substantively unconscionable because it fails to specify the jurisdiction, venue, or controlling law for the proceedings. They cite no authority holding the absence of terms covering these matters renders an arbitration agreement unconscionable. In addition, the argument ignores California's "'comprehensive, all-inclusive statutory scheme applicable to all written agreements to arbitrate disputes.'" (*Toal v. Tardif* (2009) 178 Cal.App.4th 1208, 1218.) If the parties

have not otherwise agreed, the Arbitration Act (§ 1280 et seq.) provides the number and manner of selecting arbitrators (§§ 1282, 1281.6), the time and place of, and the conduct of arbitration proceedings (§ 1282.2). As for the controlling law, the "'[a]rbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action.'" (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 10-11.)

Finally, in a footnote, defendants assert the enforceability of the LSA's arbitration clause was an issue to be decided by the arbitrator. The law is to the contrary. Generally, courts decide issues going to the validity of the arbitration agreement, including whether it is unconscionable. (*Bickel v. Sunrise Assisted Living*, *supra*, 206 Cal.App.4th at p. 8; *Chin v. Advanced Fresh Concepts Franchise Corp.* (2011) 194 Cal.App.4th 704, 709.) The parties may agree to delegate the issue of the arbitration clause's enforceability to the arbitrator. But one requirement for a valid delegation clause is that it be stated in clear and unmistakable language. (*Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 242-243.) Since the LSA does not contain a delegation clause, defendants' claim the arbitrator should have decided the enforceability of the arbitration clause lacks merit.

A showing of some procedural unconscionability is not alone enough to bar enforcement of a contractual arbitration clause. And here there is no evidence of substantive unconscionability. Thus, we agree defendants failed to carry their burden of establishing the LSA's arbitration clause is unconscionable.

C. The Arbitration Hearing

Defendants attack the conduct of the arbitration hearing on several grounds. They claim PathWayData received only four days notice of the arbitration hearing, did

not have sufficient time to prepare for it, and the arbitrator erred in refusing to postpone the hearing. Further, defendants assert PathWayData could not pay the arbitration fees.

These arguments present factual questions. On appeal, "we must accept the trial court's findings of fact if substantial evidence supports them, and we must draw every reasonable inference to support the award." (*Alexander v. Blue Cross of California* (2001) 88 Cal.App.4th 1082, 1087.)

The evidence justifies the trial court's findings on these issues. Callahan submitted a copy of a May 12 notice that ADR sent to the parties. The notice stated the arbitration hearing was scheduled for August 19. Defendants do not deny receiving it. Thus, the record reflects PathWayData had over three months notice of the arbitration hearing.

Defendants rely on the contents of defense counsel's August 15 letter to ADR. In it, the attorney asserted an ADR supervisor had purportedly informed him the arbitration would not be held without PathWayData's fee payment, which he claimed his client could not afford. Nothing in the record corroborates defense counsel's assumption PathWayData's nonpayment of the arbitration fee automatically terminated the hearing. Further, there is no evidence in the record to support defendants' claim PathWayData requested a postponement of the arbitration hearing. Given the factual background, we conclude the trial court did not err in rejecting the lack of notice argument. (*Fininen v. Barlow* (2006) 142 Cal.App.4th 185, 189-190 [substantial evidence standard of review applies where case decided "'on affidavits or declarations'"].)

The trial court also held defendants "ma[d]e no showing they could not pay their arbitration fee," noting PathWayData could afford to pay the attorney, who not only appeared at both arbitration hearings, but also submitted a brief on the alter ego issue. What's more, in a declaration supporting the petition to vacate the arbitration award, Coulter asserted PathWayData was a Nevada corporation with over 130 shareholders. Again, the evidence contradicts defendants' claim of corporate indigency.

We conclude the trial court did not err in rejecting defendants' attacks on the conduct of the arbitration hearing.

D. The Arbitrator's Decision

Describing the arbitration as "a 'rule-of-the minute-free-for-all,'" defendants complain "the arbitrator made a number of incorrect rulings." While defendants conclusorily refer to "a number of the arbitrator's actions," they specifically mention only the arbitrator's award of attorney fees and costs to Callahan. (Original bolding and capitalization omitted.)

Defendants' arguments ignore the limited role of the courts in reviewing arbitration awards. (*Moshonov v. Walsh* (2000) 22 Cal.4th 771, 775.) "Absent an express and unambiguous limitation in the contract or the submission to arbitration, an arbitrator has the authority to find the facts, interpret the contract, and award any relief rationally related to his or her factual findings and contractual interpretation." (*Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1182.) Thus, "because it vindicates the intentions of the parties that the award be final, and because an arbitrator is not ordinarily constrained to decide according to the rule of law, it is the general rule that, 'The merits of the controversy between the parties are not subject to judicial review.' [Citations.] More specifically, courts will not review the validity of the arbitrator's reasoning. [Citations.] Further, a court may not review the sufficiency of the evidence supporting an arbitrator's award. [Citations.]" (*Moncharsh v. Heily & Blase*, *supra*, 3 Cal.4th at p. 11.)

In light of these principles, we reject defendants' unspecified attacks on the arbitrator's actions and rulings. As for the claim the arbitrator erroneously awarded attorney fees and costs to Callahan, the LSA specifically provided for the recovery of fees and costs by "[t]he prevailing party in any action or proceeding to enforce any provision of this agreement." "Where, as here, a contract both compels arbitration and awards attorney's fees to the prevailing party in 'litigation' arising out of the contract, the

attorneys' fee provision applies to the arbitration." (*Harris v. Sandro* (2002) 96 Cal.App.4th 1310, 1314.) The arbitrator's decision to award Callahan its attorney fees and costs did not constitute error.

Consequently, trial court did not err in rejecting defendants' arguments on these matters.

E. Alter Ego

Finally, defendants challenge the ruling that Coulter was personally liable to Callahan on the arbitration award under the alter ego doctrine. Defendants complain they were substantially prejudiced by the arbitrator's decision to preclude them from presenting a defense during the second arbitration hearing. (§ 1286.2, subd. (a)(5).) They also contend the arbitrator's finding on Coulter's liability exceeded his authority. (§ 1286.2, subd. (a)(4).) Since we conclude the latter argument has merit, we address only that issue.

Sections 1286.2 and 1286.6 allow a court to vacate or correct an arbitration award where an arbitrator exceeds his or her powers. (*Gueyffier v. Ann Summers, Ltd., supra,* 43 Cal.4th at p. 1185; *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 375.) And "an arbitrator exceeds his powers when he acts in a manner not authorized by the contract or by law." (*Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 443.) One example is when the arbitrator "acts without subject matter jurisdiction." (*Ibid*.)

Because "arbitration requires consent" (*Lee v. Southern California University for Professional Studies* (2007) 148 Cal.App.4th 782, 786), generally "a person who is not a party to an arbitration agreement is not bound by it." (*Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581, 587.) Coulter signed the LSA, but only on PathWayData's behalf as its chief executive officer. A corporate officer's execution of an agreement containing an arbitration clause is not, alone,

sufficient to hold the officer is a party to an arbitration. (*Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 990, 992 [officer who, in his corporate capacity, signed contract that contained an arbitration clause could not be compelled to arbitrate a claim brought against him officer individually]; *Southern Cal. Pipe Trades Dist. Council No. 16 v. Merritt* (1981) 126 Cal.App.3d 530, 536 [reversing judgment confirming arbitration award against officer as corporation's alter ego where he signed agreement as officer of corporation; "an arbitration award against one party is not binding upon another person who was not party to the arbitration"].)

Further the issue of whether an arbitration agreement applies to a party who has not signed it presents a question of "'substantive arbitrability' which is to be determined by the court." (*Unimart v. Superior Court* (1969) 1 Cal.App.3d 1039, 1045, italics omitted.) Thus, "an arbitrator has no power to determine the rights and obligations of one who is not a party to the arbitration agreement or arbitration proceedings." (*Ibid*.)

Callahan petitioned to compel arbitration under the LSA solely against PathWayData. It only raised the issue of Coulter's potential liability as PathWayData's alter ego in its brief filed four days before the initial arbitration hearing. This belated assertion failed to provide Coulter with adequate notice of his potential liability for any unpaid fees.

Callahan argues the arbitrator had authority to amend his award to include Coulter as PathWayData's alter ego. But the cases cited in support of this contention involved post-arbitration rulings by a trial court exercising its power under section 187 to amend a judgment confirming an award to add an additional judgment debtor.[2]

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[2] Our decision does not leave Callahan without a remedy against Coulter. Under section 1287.4, a judgment confirming an arbitration award "has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action . . . and it may be enforced like any other judgment of the court in which it is entered . . . ." Cases have held a trial court has jurisdiction under section 187 to amend a judgment confirming an arbitration award to add a judgment debtor where the judgment creditor can show another person or entity is the alter ego of the original judgment debtor.

The trial court relied on the decision in *Hotels Nevada, LLC v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336. That case held an arbitrator's finding that a person was liable as the alter ego of corporations subject to an arbitration agreement "was sufficient to obligate him under the award." (*Id.* at p. 358.) But we find *Hotels Nevada, LLC* is distinguishable. The case involved the sale of property in Nevada under an agreement that specified the transaction was governed by Nevada law. Further, the petitioning party initially brought the arbitration against an individual who controlled the corporate defendants and he fully participated in the arbitration proceedings. Coulter did not stipulate to being a party to the arbitration and neither he nor PathWayData participated in the initial arbitration hearing on the merits of the unpaid fees claim.

We conclude that under the circumstances of this case, the arbitrator exceeded his powers by issuing an award holding Coulter personally liable for the unpaid fees. However, this conclusion does not affect the award entered against PathWayData. In addition, the essential procedural requirements contained in section 1286.8, subdivision (b), are satisfied in this case. Thus, the appropriate result is to remand the matter to the trial court with directions to correct the award by deleting the recovery against Coulter and to affirm the judgment as against PathWayData. (§ 1286.6, subd. (b).)

(*Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 508-509; *Hall, Goodhue, Haisley & Barker, Inc. v. Marconi Conf. Center Bd.* (1996) 41 Cal.App.4th 1551, 1554-1555.)

Thus, nothing in this opinion shall preclude Callahan from filing a motion in the trial court seeking to amend the judgment and add Coulter as a judgment debtor. If it can establish Coulter, in his capacity as PathWayData's alter ego, controlled the corporation's defense of the arbitration, Callahan will be entitled to have the judgment amended to add Coulter as a judgment debtor. (*Greenspan v. LADT LLC, supra,* 191 Cal.App.4th at pp. 507-508; *Hall, Goodhue, Haisley & Barker, Inc. v. Marconi Conf. Center Bd., supra,* 41 Cal.App.4th at p. 1555.) This procedure will also protect Coulter's due process rights by affording him an opportunity to oppose the motion.

III

DISPOSITION

The judgment against David Coulter is reversed and the matter remanded to the trial court with directions to correct the arbitration award by deleting the recovery against him. As to PathWayData, the judgment is affirmed. Our ruling is without prejudice to Callahan's right to file a motion under section 187 seeking to add Coulter as a judgment debtor. The parties shall bear their own costs on appeal.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.